

FCC MAIL SECTION

Before the
Federal Communications Commission
Washington, D.C. 20554

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DISPATCH

In the Matter of:)
)
Implementation of Section 207 of the Satellite)
Home Viewer Extension and Reauthorization Act) MB Docket No. 05-89
of 2004)
)
Reciprocal Bargaining Obligation)

REPORT AND ORDER**Adopted: June 6, 2005****Released: June 7, 2005**

By the Commission:

I. INTRODUCTION

1. In this Report and Order ("*Order*"), we adopt rules implementing Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004 ("SHVERA").¹ Section 207 extends Section 325(b)(3)(C) of the Communications Act until 2010 and amends that section to impose a reciprocal good faith retransmission consent bargaining obligation on multichannel video programming distributors ("MVPDs"). This section alters the bargaining obligations created by the Satellite Home Viewer Improvement Act of 1999 ("SHVIA") which imposed a good faith bargaining obligation only on broadcasters.² As discussed below, because the Commission has in place existing rules governing good faith retransmission consent negotiations and because Congress did not instruct us through the SHVERA to modify those rules in any substantive way, we conclude that the most faithful and expeditious implementation of the amendments contemplated in Section 207 of the SHVERA is to extend to MVPDs the existing good faith bargaining obligation imposed on broadcasters under our rules. We also conclude that the reciprocal bargaining obligation applies to retransmission consent negotiations between all broadcasters and MVPDs regardless of the designated market area in which they are located.

II. BACKGROUND

2. Section 325(b)(3)(C) of the Communications Act, as enacted by the SHVIA, instructed the Commission to commence a rulemaking proceeding to revise the regulations by which television

¹ The Satellite Home Viewer Extension and Reauthorization Act of 2004, Pub. L. No. 108-447, § 207, 118 Stat. 2809, 3393 (2004) (to be codified at 47 U.S.C. § 325). The SHVERA was enacted on December 8, 2004 as title IX of the "Consolidated Appropriations Act, 2005." The SHVERA requires that the Commission prescribe regulations implementing Section 207 within 180 days after the date of the enactment thereof.

² SHVIA was enacted as title I of the Intellectual Property and Communications Omnibus Reform Act of 1999 (relating to copyright licensing and carriage of broadcast signals by satellite carriers, codified in scattered sections of 17 and 47 U.S.C.), PL 106-113, 113 Stat. 1501, Appendix I (1999).

broadcast stations exercise their right to grant retransmission consent.³ Specifically, that section required that the Commission, until January 1, 2006:

prohibit a television broadcast station that provides retransmission consent from engaging in exclusive contracts for carriage or failing to negotiate in good faith, and it shall not be a failure to negotiate in good faith if the television broadcast station enters into retransmission consent agreements containing different terms and conditions, including price terms, with different multichannel video programming distributors if such different terms and conditions are based on competitive marketplace considerations.⁴

The Commission issued a Notice of Proposed Rulemaking seeking comment on how best to implement the good faith and exclusivity provisions of the SHVIA.⁵ After considering the comments received in response to the notice, the Commission adopted rules implementing the SHVIA good faith provisions and complaint procedures for alleged rule violations.⁶

3. The *Good Faith Order* determined that Congress did not intend to subject retransmission consent negotiation to detailed substantive oversight by the Commission.⁷ Instead, the order found that Congress intended that the Commission follow established precedent, particularly in the field of labor law, in implementing the good faith retransmission consent negotiation requirement.⁸ Consistent with this conclusion, the *Good Faith Order* adopted a two-part test for good faith. The first part of the test consists of a brief, objective list of negotiation standards.⁹ First, a broadcaster may not refuse to negotiate with an MVPD regarding retransmission consent. Second, a broadcaster must appoint a negotiating representative with authority to bargain on retransmission consent issues. Third, a broadcaster must agree to meet at reasonable times and locations and cannot act in a manner that would unduly delay the course of negotiations. Fourth, a broadcaster may not put forth a single, unilateral proposal. Fifth, a broadcaster, in responding to an offer proposed by an MVPD, must provide considered reasons for rejecting any aspects of the MVPD's offer. Sixth, a broadcaster is prohibited from entering into an agreement with any party conditioned upon denying retransmission consent to any MVPD. Finally, a broadcaster must agree to execute a written retransmission consent agreement that sets forth the full agreement between the broadcaster and the MVPD.¹⁰

4. The second part of the good faith test is based on a totality of the circumstances standard. Under this standard, an MVPD may present facts to the Commission which, even though they do not allege a violation of the specific standards enumerated above, given the totality of the circumstances constitute a failure to negotiate in good faith.¹¹

³ 47 U.S.C. §325(b)(3)(C).

⁴ 47 U.S.C. §325(b)(3)(C)(ii).

⁵ *Implementation of the Satellite Home Viewer Improvement Act of 1999: Retransmission Consent Issues*, 14 FCC Rcd 21736 (1999) ("Good Faith Notice").

⁶ *Implementation of the Satellite Home Viewer Improvement Act of 1999: Retransmission Consent Issues*, 15 FCC Rcd 5445 (2000) ("Good Faith Order"), recon. granted in part, 16 FCC Rcd 15599 (2001).

⁷ *Good Faith Order*, 15 FCC Rcd at 5450.

⁸ *Id.* at 5453-54.

⁹ *Id.* at 5457-58.

¹⁰ *Id.* at 5462-5464; see 47 C.F.R. §§ 76.65(b)(1)(i)-(vii).

¹¹ *Good Faith Order*, 15 FCC Rcd at 5458; see 47 C.F.R. § 76.65(b)(2).

5. The *Good Faith Order* provided examples of negotiation proposals that presumptively are consistent and inconsistent with “competitive marketplace considerations.”¹² The *Good Faith Order* found that it is implicit in Section 325(b)(3)(C) that any effort to further anti-competitive ends through the negotiation process would not meet the good faith negotiation requirement.¹³ The order stated that considerations that are designed to frustrate the functioning of a competitive market are not “competitive marketplace considerations.” Further, conduct that is violative of national policies favoring competition - that, for example, is intended to gain or sustain a monopoly, an agreement not to compete or to fix prices, or involves the exercise of market power in one market in order to foreclose competitors from participation in another market -- is not within the competitive marketplace considerations standard included in the statute.¹⁴

6. Finally, the *Good Faith Order* established procedural rules for the filing of good faith complaints pursuant to Section 76.7 of the Commission’s rules.¹⁵ The burden of proof is on the complainant to establish a good faith violation and complaints are subject to a one year limitations period.¹⁶

III. DISCUSSION

7. In enacting the SHVERA good faith negotiation obligation for MVPDs, Congress used language identical to that of the SHVIA imposing a good faith obligation on broadcasters, requiring the Commission, until January 1, 2010, to:

prohibit a multichannel video programming distributor from failing to negotiate in good faith for retransmission consent under this section, and it shall not be a failure to negotiate in good faith if the distributor enters into retransmission consent agreements containing different terms and conditions, including price terms, with different broadcast stations if such different terms and conditions are based on competitive marketplace considerations.¹⁷

The Commission issued a Notice of Proposed Rulemaking seeking comment on how to implement the reciprocal bargaining obligation set forth in the SHVERA.¹⁸ The Commission also requested comment on whether the good faith negotiating standards may be different for carriage of television broadcast stations outside of their designated market area (“DMA”).¹⁹

¹² *Good Faith Order*, 15 FCC Rcd at 5469-70.

¹³ *Id.* at 5470.

¹⁴ *Id.*

¹⁵ 47 C.F.R. § 76.65(c); *see* 47 C.F.R. § 76.7.

¹⁶ 47 C.F.R. §§ 76.65(d) & (e).

¹⁷ 47 U.S.C. § 325(b)(3)(C)(iii).

¹⁸ *Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004: Reciprocal Bargaining Obligations*, FCC 05-49 (rel. March 7, 2005) (“*Notice*”). A list of commenters is contained in Appendix B.

¹⁹ *Notice* at ¶ 8. A DMA is a geographic market designation created by Nielsen Media Research that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included. For a more complete description of how counties are allocated, *see* Nielsen Media Research’s *Nielsen Station Index: Methodology Techniques and Data Interpretation*.

A. The Reciprocal Bargaining Obligation for Entities within the Same DMA

8. In the *Notice*, the Commission observed that Congress did not instruct the Commission to amend its existing good faith rules in any way other than to implement the statutory extension and impose the good faith obligation on MVPDs. Accordingly, the Commission stated that it did not believe that Congress intended that the Commission revisit the findings and conclusions that were reached in the SHVIA rulemaking.²⁰ The little legislative history directly applicable to Section 207 supports this approach and, in pertinent part, provides:

In light of evidence that retransmission negotiations continue to be contentious, the Committee chose to extend these obligations, and also to begin applying the good-faith obligations to MVPDs. The Committee intends the MVPD good-faith obligations to be analogous to those that apply to broadcasters, and not to affect the ultimate ability of an MVPD to decide not to enter into retransmission consent with a broadcaster.²¹

The *Notice* stated that the Commission believed that the implementation of Section 207 most consistent with the apparent intent of Congress is to amend our existing rules to apply equally to both broadcasters and MVPDs and tentatively concluded Sections 76.64(l) and 76.65 should be amended accordingly.²² The *Notice* sought comment on that approach and any other reasonable implementation of Section 207.²³

9. The majority of commenters agreed with the implementation proposed by the Commission in the *Notice* as it applies to in-market negotiations.²⁴ The Network Affiliates assert that:

[b]ecause it is presumed that Congress acts with knowledge of the existing regulatory framework when it enacts new legislation, including when the new law incorporates the language of the prior law, the *Notice's* conclusion that "Congress did not intend that the Commission revisit the findings and conclusions that were reached in the SHVIA rulemaking" is undoubtedly correct, as is the *Notice's* tentative conclusion "to amend our existing rules to apply equally to both broadcasters and MVPDs."²⁵

10. EchoStar asserts, however, that MVPDs and broadcasters occupy significantly different positions when negotiating retransmission consent and that the Commission should recognize this distinction when applying the totality of the circumstances test and in determining whether specific terms and conditions are consistent with "competitive market place conditions."²⁶ EchoStar asserts that it would be premature to provide an extensive list of bargaining conduct that could be considered a failure to

²⁰ *Notice* at ¶ 7.

²¹ H.R. Rep. No. 108-634, 108th Cong., 2nd Sess. 19 (2004) ("House Report").

²² *Notice* at ¶ 7.

²³ *Id.*

²⁴ See EchoStar Comments at 2; NAB Comments at 1-2; Network Affiliates Comments at 3; NAB Reply Comments at 1; NCTA Comments at 5 (agreeing that negotiating parties should be subject to the same time, place and manner objective rules once negotiations are underway); ACA Comments at 5 (seeking only procedural, but not substantive rule changes); NBC Comments at 10.

²⁵ Network Affiliates Comments at 3, quoting *Notice* at ¶ 7 (footnotes omitted)

²⁶ EchoStar Comments at 2.

negotiate in good faith under the totality of the circumstances test and advises that the Commission pursue such measures on a case-by-case basis.²⁷ Finally, EchoStar argues that the Commission should clarify that tying is not consistent with competitive marketplace considerations if it would violate the antitrust laws.²⁸

11. NCTA argues that:

Congress intended that broadcasters *have to* offer to make their programming available to all MVPDs at some price or other terms. Otherwise, one MVPD could obtain de facto exclusivity over a broadcaster's signal.

* * *

MVPDs, on the other hand, have a duty to carry a local broadcast signal if the broadcaster opts for mandatory carriage, but no duty to agree to pay or carry a broadcaster if it elects *retransmission consent*. Indeed, Congress made clear in section 207 that it intends the "analogous" good faith obligations to "not affect the ultimate ability of an MVPD to decide not to enter into retransmission consent with a broadcaster."²⁹

Absent an MVPD's ability to ultimately refuse carriage of a broadcaster that has elected retransmission consent, argues NCTA, reciprocal good faith bargaining rules simply turn retransmission consent into another form of must carry but with the possibility of payment in addition. NCTA states that it is broadcasters' unique status as users of public spectrum with the obligation to provide free over-the-air signals and ability to exact mandatory carriage on cable and satellite providers that triggers their obligation to negotiate retransmission consent in good faith in all instances.³⁰ NCTA asserts that there are "no corresponding reasons why cable operators should be required to negotiate to carry the signals of broadcasters that have specifically elected to forgo their statutory right to be carried."³¹ Citing a "host of legitimate editorial and business reasons why a cable operator could decide not to carry a particular broadcast station," NCTA maintains that the Commission should interpret the good faith negotiation rules to give MVPDs the right to refuse to enter into retransmission consent negotiations.³² NAB counters that NCTA's argument nullifies the language of the statute imposing a reciprocal good faith negotiation obligation on MVPDs and Congress's intent that such obligation "be analogous [to] those that apply to broadcasters."³³ At the very least, NCTA asserts, the Commission should confirm that cable operators have the right to insist upon carriage compensation in all retransmission consent negotiations.³⁴

²⁷ *Id.*; see Network Affiliate Reply Comments at 11.

²⁸ EchoStar Comments at 2-3.

²⁹ NCTA Comments at 5-6, quoting House Report at 19 (emphasis NCTA).

³⁰ NCTA Reply Comments at 2-3.

³¹ *Id.* at 3.

³² NCTA Comments at 7-8. NCTA's cited reasons include when a station largely duplicates content already carried, increases in compulsory copyright expenses, syndicated exclusivity or network non-duplication blackout problems, or the desire to use available capacity for other video or non-video services. *Id.* at 8.

³³ NAB Reply Comments at 2, quoting House Report at 19; see Network Affiliates Reply Comments at 2 ("While a broadcast station takes the risk, in electing to negotiate with an MVPD for retransmission consent, that the parties will fail to reach a mutually acceptable agreement, SHVERA's new provision makes it plain that one risk the broadcast station is *not* taking is that the MVPD will simply refuse to negotiate at all.") (emphasis Network Affiliates).

³⁴ NCTA Reply Comments at 3.

12. Arguing that the Commission has recognized the imbalance of power in retransmission consent negotiations between media conglomerates and small and medium sized cable operators, ACA requests that the Commission adopt procedural protections for these cable operators.³⁵ ACA requests that the Commission require that broadcasters give 30 days written notice to a small or medium sized cable operator of their intent to file a good faith complaint. In addition, ACA asks that the Commission provide an extended 30 day period in which to respond to good faith complaints filed against them.³⁶ ACA emphasizes that these protections are solely procedural and that the substantive good faith rules would be the same for MVPDs of all sizes.³⁷ NAB and the Network Affiliates assert that ACA offers no support for a procedural distinction for medium and small cable operators and argue that the better course would be to grant individual requests for extensions of time on a case-by-case basis.³⁸ Finally, ACA asks the Commission to clarify that it is not a violation of the good faith rules for a cable operator to decline to carry a broadcaster's multicast programming.³⁹ NAB and the Network Affiliates assert that the Commission, in the *Good Faith Order*, found that proposals for carriage "conditioned on carriage of any other programming, such as a broadcaster's digital signals. . . ." to be consistent with competitive marketplace considerations.⁴⁰ These commenters argue that ACA provides no evidence to justify a departure from the Commission's finding. Indeed, NBC asks the Commission to clarify that, now and after completion of the digital transition, the good faith obligation requires MVPDs to negotiate for the entire free, over-the-air signal offered by a television station.⁴¹

13. After reviewing the record in this proceeding, we adopt the tentative conclusion set forth in the *Notice* in order to implement the will of Congress as indicated in Section 207 and the legislative history. Accordingly, we will amend our existing rules to apply equally to both broadcasters and MVPDs.⁴² Broadcasters will now be able to file a complaint against an MVPD alleging that such MVPD breached its duty to negotiate retransmission consent in good faith.⁴³ Broadcasters and MVPDs must comply with the seven objective negotiation standards set forth in Section 76.65(b)(1) as amended herein. In addition, MVPDs and broadcasters will now be equally subject to, and able to file, a complaint based on the totality of the circumstances.⁴⁴

³⁵ ACA Comments at 5, citing *General Motors Corporation and Hughes Electronic Corporation, Transferors and The News Corporation Limited, Transferee, For Authority to Transfer Control*, 19 FCC Rcd 473, 552 (2004) ("[S]mall and medium sized MVPDs may be at particular risk of temporary foreclosure strategies aimed at securing supra-competitive programming rate increases for 'must have' programming. . . .").

³⁶ *Id.* at 5. ACA argues that these procedural protections should apply not just to cable companies that serve 400,000 or fewer subscribers, but should also extend to "all medium-sized, non-vertically integrated cable companies." *Id.* n.7.

³⁷ *Id.* at 5.

³⁸ NAB Reply Comments at 5; Network Affiliates Reply Comments at 12-13.

³⁹ ACA Comments at 6. ACA asserts that this is consistent with the Commission's holding that the must carry rules do not require carriage of other than the primary digital video stream. *Id.*, citing *Carriage of Digital Television Broadcast signals: Amendments to Part 76 of the Commission's Rules*, CS Docket No. 98-120 at ¶ 41 (2005).

⁴⁰ NAB Reply Comments at 6, Network Affiliates Reply Comments, each quoting *Good Faith Order*, 15 FCC Rcd at 5469 (emphasis NAB).

⁴¹ NBC Reply Comments at 5.

⁴² Sections 76.64(l) and 76.65 will be amended as set forth in Appendix A of this *Order*.

⁴³ See Appendix A, § 76.65(c).

⁴⁴ See Appendix A, § 76.65(b)(2).

14. We cannot agree with NCTA's assertion that, because of the differences between MVPDs and broadcasters, MVPDs should have the option of refusing outright to negotiate retransmission consent with any broadcaster within that MVPD's DMA. To agree with NCTA's assertion would be to render Section 207 a virtual nullity. Under NCTA's interpretation of Section 207, the good faith negotiation obligation is not triggered unless and until an MVPD has determined that retransmission of a broadcaster's signal is attractive. The Commission rejected similar arguments raised by broadcasters in implementing the good faith provisions of the SHVIA:

[W]e do not interpret Section 325(b)(3)(C) as largely hortatory as suggested by some commenters. As we stated in the Notice, Congress has signaled its intention to impose some heightened duty of negotiation on broadcasters in the retransmission consent process. In other words, Congress intended that the parties to retransmission consent have negotiation obligations greater than those under common law. . . . We believe that, by imposing the good faith obligation, Congress intended that the Commission develop and enforce a process that ensures that broadcasters and MVPDs meet to negotiate retransmission consent and that such negotiations are conducted in an atmosphere of honesty, purpose and clarity of process.⁴⁵

This "heightened duty of negotiation" has now been imposed by Congress on MVPDs. In drafting Section 207, Congress was fully aware of the Commission's implementation of the SHVIA good faith provision.⁴⁶ Armed with this knowledge, Congress crafted the reciprocal bargaining provision to mirror the obligation imposed by the SHVIA and the House Report stated that it was intended to be "analogous" to the SHVIA good faith obligation.⁴⁷ We believe that if Congress had intended that this duty apply to MVPDs only when they were affirmatively interested in a prospective carriage arrangement, it would have so indicated in the statute or legislative history.⁴⁸ Moreover, we do not believe that the obligations imposed herein will unduly burden MVPDs. First, the good faith obligation merely requires that MVPDs comply with the per se negotiating standards of Section 76.65(b)(1) and refrain from insisting on rates, terms and conditions that are inconsistent with competitive marketplace considerations. Second, as discussed below, because we conclude that negotiations involving truly distant broadcasters and MVPDs and negotiations for which a broadcaster is contractually precluded from reaching consent may be truncated, MVPDs and broadcasters alike will not be required to engage in an unending procession of extended negotiations. Finally, provided that a party to a reciprocal bargaining negotiation complies with the requirements of the Commission's rules, failure to reach agreement would not violate either Section 325(b)(3)(C) or Section 76.65 of the Commission's rules. Accordingly, NCTA's argument that the reciprocal bargaining obligation will lead to another form of must carry is incorrect.

15. With regard to the totality of the circumstances test, we agree with EchoStar that MVPDs and broadcasters occupy different positions when negotiating retransmission consent and that the Commission should recognize this distinction when applying the totality of the circumstances test and in determining whether specific terms and conditions are consistent with competitive marketplace

⁴⁵ *Good Faith Order*, 15 FCC Rcd at 5455 (footnotes and internal quotation marks omitted).

⁴⁶ See *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change. So too, where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.") (citations omitted); *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998) (same).

⁴⁷ House Report at 19.

⁴⁸ Of course, the reciprocal bargaining obligation would be largely unnecessary if it were limited in this manner.

considerations. The Commission must always take into account the relative bargaining positions of the parties when examining the totality of the circumstances for a failure to negotiate in good faith.⁴⁹ We also agree that identifying additional negotiating proposals that can be considered to reflect a failure to negotiate in good faith under the totality of the circumstances test should be done on a case-by-case basis. Finally, we clarify that tying is not consistent with competitive marketplace considerations if it would violate the antitrust laws.⁵⁰

16. We decline to establish special procedures for medium and small cable operators as requested by ACA. We agree with NAB and the Network Affiliates that ACA has failed to justify different procedural treatment for smaller cable operators. We fail to see what benefit the 30 day pre-complaint notice would have for these operators, particularly in instances where a retransmission consent agreement will imminently expire with the attendant loss of the broadcaster's signal. Because the Commission concluded in the *Good Faith Order* that MVPDs cannot continue to carry a broadcaster's signal after the existing consent expires even if a complaint is pending with the Commission,⁵¹ it benefits both broadcasters and MVPDs alike that the Commission decline to institute a procedural delay that would preclude the filing of a good faith complaint as soon as possible after the alleged violation. Accordingly, we believe that the more prudent course is to entertain individual requests for extensions of time on a case-by-case basis through which MVPDs and broadcasters, large and small, can establish that the existing pleading cycle set forth in Section 76.7 of the Commission's rules is inadequate to allow that party to present an effective defense to a good faith complaint.

17. ACA requested that the Commission clarify that it is not a violation of the good faith rules for a cable operator to decline to carry a broadcaster's multicast programming. Conversely, NBC asks that the Commission determine that now, and after completion of the digital transition, the good faith obligation requires MVPDs to negotiate for the entire free, over-the-air signal offered by a television station. The Commission stated numerous times in the *Good Faith Order* that "proposals for carriage conditioned on carriage of any other programming such as a broadcaster's digital signals" are presumptively consistent with competitive marketplace considerations and the good faith negotiation requirement.⁵² As the Commission stated:

We do not find anything to suggest that, for example, requesting an MVPD to carry . . . digital broadcast signals is impermissible or other than a competitive marketplace consideration. . . . After passage of the 1992 Cable Act, Congress left negotiation of retransmission consent to the give and take of the competitive marketplace. In SHVIA, absent conduct that is violative of national policies favoring competition, we believe Congress intended this same give and take to govern retransmission consent. In addition, *we point out that these are bargaining proposals which an MVPD is free to accept, reject or counter with a proposal of its own.*⁵³

⁴⁹ For example, a negotiating proposal put forth by a small cable operator might be found consistent with competitive marketplace considerations, whereas the same proposal put forth by the nation's largest MVPD might not.

⁵⁰ See *Good Faith Order*, 15 FCC Rcd at 5470 ("Conduct that is violative of national policies favoring competition – that is, for example, intended to gain or sustain a monopoly, is an agreement not to compete or fix prices, or involves the exercise of market power in one market in order to foreclose competitors from participation in another market – is not within the competitive marketplace considerations standard included in the statute.").

⁵¹ *Id.* at 5471-72.

⁵² *Id.* at 5469.

⁵³ *Id.* at 5469-70 (emphasis added).

Whether an MVPD carries a broadcaster's entire free, over-the-air signal, be it high definition or multicast, is a matter to be determined through the retransmission consent negotiation process. The reciprocal bargaining obligation neither requires nor prohibits the carriage of a broadcaster's entire free signal. If it is important for a broadcaster to obtain full carriage of its digital signal, the broadcaster must be willing to accommodate the reasonable requests of an MVPD in order to secure such carriage. If it is important for an MVPD to carry part, but not all, of a broadcaster's digital signal it likewise must negotiate in good faith. In each instance, either party must be willing to forgo carriage if agreement is not reached after negotiating in accordance with the rules established herein.

B. The Reciprocal Bargaining Obligation and Entities Located in Different DMAs

18. In the *Notice*, the Commission noted that the original SHVIA good faith provision by its terms applied to "television broadcast stations."⁵⁴ Similarly, the SHVERA good faith provision applies to "multichannel video programming distributors." The Commission sought comment whether, under the statute, the good faith negotiating standards may be any different for carriage of significantly viewed television broadcast stations outside of their DMA.⁵⁵ Significantly viewed television broadcast stations do not have carriage rights outside of their DMA and carriage of their signals by out-of-market MVPDs is permissive. The *Notice* asked whether the same good faith negotiation standard should apply to broadcasters and MVPDs regardless of the DMA in which they reside, or whether the good faith retransmission consent negotiation obligation should apply only to MVPDs and broadcasters located in the same DMA.⁵⁶ As discussed below, we do not interpret Section 325(b)(3)(C) to limit the geographic scope of the reciprocal bargaining obligation in retransmission consent negotiations. At the same time, we conclude that the nature of this obligation may vary according to where the MVPD and the broadcaster are located. With regard to significantly-viewed and in-market signals, we believe that the obligation should be essentially the same. With regard to more distant signals, the obligation applies, but distance is likely to be a critical factor in determining compliance under the totality of circumstances test.

19. The Network Affiliates, NAB, and NBC assert that the good faith bargaining obligation should not apply to negotiations for consent to retransmit broadcast signals outside of a television station's market.⁵⁷ The Network Affiliates argue that:

Indeed, SHVERA itself, in enacting new Section 340, the significantly viewed provision, expressly provides (1) that "[c]arriage of a signal under this section is not mandatory" by a satellite carrier and (2) that the "eligibility of the signal of a station to be carried under this section does not affect any right of the licensee of such station to grant (or withhold) retransmission consent under section 325(b)(1)."⁵⁸

The Network Affiliates stress that, in granting significantly viewed broadcasters the right to withhold retransmission consent, the SHVERA "specifically references Section 325(b)(1), the statutory

⁵⁴ *Notice* at ¶ 8.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Network Affiliates Comments at 5; NAB Comments at 2-3; NBC Comments at 10.

⁵⁸ Network Affiliates Comments at 4 (footnotes omitted).

retransmission consent provision, not Section 325(b)(3)(C), the statutory good faith bargaining provision.”⁵⁹

20. NBC argues that, in adopting the SHVIA, Congress expressly intended to protect the property rights of program providers as well as the market-based outcomes of private negotiations between program providers and local broadcasters.⁶⁰ Citing the legislative history of SHVIA, NBC asserts that Congress was guided by three principles: (1) the desire to promote competition in the marketplace for MVPD programming to reduce costs to subscribers; (2) “the importance of protecting and fostering the system of television networks as they relate to the concept of localism;” and (3) “perhaps most importantly” the need to act narrowly to protect the “exclusive property rights granted by the Copyright Act to copyright holders” and “minimize the effects of government intrusion on the broader market in which the affected property rights and industries operate.”⁶¹ NBC maintains that neither Congress nor the Commission suggested that the good faith requirement should be read to override the private property rights of networks, syndicators or other program providers and permit a distribution outlet, either broadcaster or cable operator, to consent to further redistribution of programming that the outlet does not own.⁶² NBC concedes that under the good faith requirements, a station cannot refuse to negotiate with an MVPD located in the same DMA regarding retransmission consent. Similarly, argues NBC, a station cannot enter into an agreement with an MVPD that prohibits the station from entering into retransmission consent with another MVPD. Neither of these concepts, however, prevents a station from refusing to grant out-of-market retransmission consent with respect to programming for which it does not hold extra-territorial rights.⁶³ NBC also argues that Congress has consistently, both in the 1992 Cable Act⁶⁴ and the SHVIA,⁶⁵ protected the rights afforded by programming providers to local stations against distant stations. The Network Affiliates note that this concern is carried through in the legislative history of the SHVERA.⁶⁶ NBC also cites numerous points in the *Good Faith Order* in which the Commission discussed the “local” nature of the good faith negotiation obligation.⁶⁷

⁵⁹ *Id.* at 4-5; see NAB Comments at 2-3 (agreeing with the conclusion and supporting analysis of the Network Affiliates on this issue); Network Affiliates Reply Comments at 4. NAB argues further that “since neither party is obligated to even begin retransmission consent negotiations, or to reach a retransmission consent agreement, logic dictates that there cannot be any obligations to negotiate in good faith.” NAB Reply Comments at 3.

⁶⁰ NBC Comments at 2.

⁶¹ *Id.*, quoting H.R. Rep. No. 106-464, Conference Report, Joint Explanatory Statement of the Committee of the Conference, at 92 (1999) (“SHVIA Conference Report”); Network Affiliates Reply Comments at 4.

⁶² NBC Comments at 3-4.

⁶³ *Id.* At 5.

⁶⁴ S. Rep. No. 102-92, at 38, 106 Stat. 1133, 1171 (1991). The legislative history to the 1992 Cable Act provides that “the Committee has relied on the protections which are afforded local stations by the FCC’s network nonduplication and syndicated exclusivity rules. Amendments or deletions of those rules in a manner that would allow distant stations to be substituted on cable systems for carriage [of] local stations carrying the same programming would, in the Committee’s view, be inconsistent with the regulatory structure created in [the 1992 Cable Act].” *Id.*

⁶⁵ SHVIA Conference Report at 92. The legislative history of the SHVIA states that “the broadcast television market has developed in such a way that copyright licensing practices in this area take into account the national network structure, which grants exclusive territorial rights to programming in a local market to local stations either directly or through affiliation agreements.” *Id.* The SHVIA Conference Report went on to state that “allowing the importation of distant or out-of-market network stations in derogation of the local stations’ exclusive right – bought and paid for in market-negotiated arrangements – to show the works in question undermines those market arrangements.” *Id.* at 92-93. Accordingly, Congress structured the compulsory copyright license in SHVIA “to hew as closely to those arrangements as possible.” *Id.* at 92.

⁶⁶ The SHVERA House Report provides that “[w]here a satellite provider can retransmit a local station’s exclusive network programming but chooses to substitute identical programming from a distant network affiliate of the same
(continued....)

21. Several commenters argue that the reciprocal bargaining obligation should be the same regardless of whether or not the entities are located in the same DMA, or at a minimum, extended to those areas in which a station is significantly viewed.⁶⁸ EchoStar argues that “[i]n the absence of specific limiting language, the good faith standards established by the Commission under Section 325(b)(3)(C) apply to all cases where retransmission consent is required.”⁶⁹ As support for this conclusion, EchoStar, and other commenters, cite the Media Bureau’s decision in *Monroe, Georgia Water Light and Gas Commission v. Morris Network, Inc.*, in which the Media Bureau stated that “[w]e caution broadcasters to be aware of existing contractual obligations that affect a television station’s ability to negotiate retransmission consent in good faith. The statute appears to apply equally to stations and MVPDs in the same local market or different markets.”⁷⁰ The Network Affiliates argue that reliance on the Media Bureau’s *Monroe* decision is misplaced because the statement quoted is no more than equivocal *dicta*.⁷¹

22. DirecTV and EchoStar argue that the fact that out-of-market broadcasters have no carriage rights is inapposite because once an in-market broadcaster forgoes mandatory carriage, it too has no guaranteed carriage rights.⁷² DirecTV asserts that allowing significantly viewed broadcasters to refuse to negotiate with DBS operators where cable operators already distribute such programming would violate SHVERA’s prohibition on exclusive retransmission consent agreements.⁷³ ACA states that this situation is particularly problematic for its members, many of which serve rural communities on the edges of DMAs in which out-of-market signals from an adjoining DMA are considered “local” by subscribers.⁷⁴

23. EchoStar argues further that contractual provisions that restrict a broadcaster’s ability to negotiate retransmission consent in good faith (e.g., certain network affiliation agreements) must be declared per se good faith violations by the Commission.⁷⁵ Citing the *Good Faith Order*, EchoStar states that the Commission has already determined that “[p]roposals that result from agreements not to compete or fix prices” are presumed inconsistent with competitive marketplace considerations.⁷⁶ EchoStar asserts that NBC’s “protection of property rights” argument is flawed because it assumes that copyright holders have the “unfettered right to control further redistribution of broadcast programming.”⁷⁷ EchoStar maintains that Congress limited copyright holders’ absolute control over redistribution of broadcast programming when it created the cable and satellite compulsory licenses for retransmission of broadcast

(...continued from previous page)

network instead, the satellite carrier undermines the value of the license negotiated by the local broadcast station as well as the continued viability of the network-local affiliate relationship.” House Report at 11.

⁶⁷ NBC Comments at 7-8, citing *Good Faith Order*, 15 FCC Rcd at 5446, 5449.

⁶⁸ See EchoStar Comments at 3-5; ACA Comments at 3-4.

⁶⁹ EchoStar Comments at 3; see ACA Comments at 3; EchoStar Reply Comments at 2.

⁷⁰ EchoStar Comments at 3; ACA Comments at 3-4, quoting *Monroe, Georgia Water Light and Gas Commission v. Morris Network, Inc.*, 19 FCC Rcd 13997 n. 24 (M.B. 2004).

⁷¹ Network Affiliates Reply Comments at 6-7.

⁷² EchoStar Reply Comments at 3; DirecTV Reply Comments at 3.

⁷³ DirecTV Reply Comments at 4.

⁷⁴ ACA Comments at 4.

⁷⁵ EchoStar Comments at 4; EchoStar Reply Comments at 6.

⁷⁶ EchoStar Comments at 4, quoting *Good Faith Order*, 15 FCC Rcd at 5470.

⁷⁷ EchoStar Reply Comments at 4.

signals.⁷⁸ NBC asserts that compulsory copyright licenses offer no refuge from territorial exclusivity because “[t]hese limited statutory licenses provide an administratively convenient means to permit redistribution of proprietary television programming via cable and satellite, but only *after* the [cable or satellite provider] has received the express consent of the affected television station, subject to the terms of that station’s existing programming agreements with regard to territorial exclusivity.”⁷⁹ EchoStar argues that contractual provisions that prevent the granting of retransmission consent to out-of-market MVPDs would thwart Congress’s intent to make out-of-market stations available to MVPD subscribers through the compulsory licensing provisions of the Copyright Act.⁸⁰ ACA agrees asserting that the plain language of Section 325(b), the legislative history of SHVIA and the Commission’s implementing regulations prohibit market exclusivity provisions in network affiliation agreements.⁸¹ The Network Affiliates counter that there is nothing in SHVERA or its legislative history to justify the sweeping effect that EchoStar desires – “to effectively nullify the territorial restrictions in programming agreements that serve to grant, and to limit, program exclusivity.”⁸²

24. EchoStar also contends that local broadcasters are beginning to demand that MVPDs contract away their right to import significantly viewed out-of-DMA stations as part of retransmission consent negotiations.⁸³ The Network Affiliates defend this practice. Citing the *Good Faith Order*, the Network Affiliates state that the Commission found that it would be presumptively inconsistent with competitive marketplace considerations and the good faith negotiation requirement for a broadcast station to offer a proposal that “specifically foreclose[s] carriage of other programming services by the MVPD that *do not substantially duplicate the proposing broadcaster’s programming*.”⁸⁴ Thus, argue the Network Affiliates, broadcasters can offer proposals that foreclose the carriage of other programming services by an MVPD that substantially duplicate the local broadcast station’s programming.

25. DirecTV advises the Commission to adopt an “agree with one, negotiate with all” rule that applies to negotiations for significantly viewed broadcast signals. Under this rule, both broadcasters and MVPDs are free to refuse outright to negotiate carriage of significantly viewed signals under certain conditions.⁸⁵ Once a party has agreed to significantly viewed carriage with any other party, however, it must negotiate in good faith for carriage with all other similarly situated parties.⁸⁶ DirecTV explains its proposal as follows:

Any broadcaster would be free, if it wished, to categorically reject negotiations for carriage in out-of-market, significantly viewed areas – but only if it did so with respect to *all* MVPDs. Once a broadcaster granted consent for one MVPD to carry such signals, however, it would have to negotiate with all other MVPDs for such carriage, and such negotiations would have to comply with the Commission’s good faith negotiation standard. . . . This rule would apply

⁷⁸ *Id.* at 4-5.

⁷⁹ NBC Reply Comments at 2 (emphasis NBC).

⁸⁰ *Id.* at 5.

⁸¹ ACA Reply Comments at 3-5.

⁸² Network Affiliates Reply Comments at 9.

⁸³ EchoStar Reply Comments at 4-5.

⁸⁴ Network Affiliates Reply Comments at 9-10, quoting *Good Faith Order*, 15 FCC Rcd at 5470 (emphasis Network Affiliates).

⁸⁵ DirecTV Reply Comments at 6.

⁸⁶ *Id.*

reciprocally to MVPDs. DirecTV would be free to decide, for example, that it will not carry New York stations in significantly viewed areas in the Hartford DMA and, having made that decision, would be free not to negotiate with New York stations regarding such carriage. If however, it were to carry one New York station in a Hartford significantly viewed area, it would have to negotiate [in good faith] with all [significantly viewed] New York stations seeking carriage in Hartford. . . .⁸⁷

Under either scenario, DirecTV asserts, the parties would not be required to reach agreement, but only to negotiate in good faith in accordance with the Commission's rules.⁸⁸

26. As noted above, the SHVIA good faith provision by its terms applied to "television broadcast stations." Similarly, the SHVERA good faith provision applies to "multichannel video programming distributors." Neither the text of the SHVIA or the SHVERA, nor their respective legislative histories, expressly delineate a territorial boundary of the good faith negotiation obligation. Some commenters argue that the reciprocal bargaining obligation attaches to negotiations between MVPDs and broadcasters that are significantly viewed outside of their DMA. Others assert that these obligations attach to any retransmission consent negotiation regardless of where the MVPD and the broadcaster are situated. For the reasons discussed below, we agree with the latter interpretation of Section 325(b)(3)(C).⁸⁹

27. The language adopted by Congress in Section 325(b)(3)(C) of the SHVIA, as well the amendment adopted in the SHVERA, support the conclusion that the reciprocal bargaining obligation applies to all retransmission consent agreements. The text of the statute applies without qualification to "television broadcast stations," "multichannel video programming distributors" and "retransmission consent agreements."⁹⁰ Nor does the legislative history appear to contemplate a limitation on the reciprocal bargaining obligation such that it would apply to some, but not all, retransmission consent negotiations. Other than mandatory carriage pursuant to Section 614 and satellite carrier service to unserved households, all other lawful carriage of television broadcast stations is by retransmission consent. There is no statutory or regulatory distinction between in-market carriage and out-of-market carriage pursuant to retransmission consent. Here, we believe that the statute is clear on its face and we must give effect to its plain meaning.⁹¹ Further, we believe that this is the best interpretation of the provision consistent with the SHVIA, the SHVERA and their respective legislative histories. This interpretation avoids the incongruous result of satellite carriers seeking to carry a broadcaster in significantly viewed communities facing outright refusal to negotiate carriage by such broadcaster even though cable operators in the same communities are actually carrying such programming through retransmission consent.⁹² We fail to see how an interpretation of Section 325(b)(3)(C) that permits this result implements Congress's direction that "MVPD good-faith obligations . . . be analogous to those that

⁸⁷ *Id.* at 6-7 (emphasis DirecTV).

⁸⁸ *Id.* at 7.

⁸⁹ Because we reach this conclusion, we need not examine DirecTV's "agree with one, negotiate with all" proposal.

⁹⁰ 47 U.S.C. § 325(b)(3)(C).

⁹¹ See *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984); *Qwest Corp. v. FCC*, 258 F.3d 1191, 1199 (10th Cir. 2001); *Bell Atlantic Tel. Cos. V. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997).

⁹² In this regard, we agree with DirecTV that a contrary interpretation might conflict with the prohibition on exclusive retransmission consent agreements contained in Section 325(b)(3)(C). See 47 U.S.C. § 325(b)(3)(C); DirecTV Reply Comments at 4.

apply to broadcasters.”⁹³ Accordingly, we conclude that the reciprocal bargaining obligation of Section 325(b)(3)(C) applies to the negotiation of all retransmission consent.

28. Some commenters argue that a separate provision of the SHVERA, new Section 340 of the Communications Act, indicates that the reciprocal bargaining provision applies solely to in-market retransmission consent negotiations. We disagree. Section 340(d) of the Communications Act, as enacted in the SHVERA, discusses the carriage rights of satellite carriers with respect to significantly viewed broadcast stations and states that “[t]he eligibility of the signal of a station to be carried under this section does not affect any right of the licensee of such station to grant (or withhold) retransmission consent under section 325(b)(1).”⁹⁴ The legislative history of the provision provides that:

Cable operators are under no obligation to carry in a local market a distant significantly viewed signal, and the Committee intends satellite carriage of such a distant signal in a local market to be similarly voluntary. . . . Cable operators must obtain retransmission consent to carry distant significantly viewed signals into a local market and the committee intends the same obligation to apply to satellite.⁹⁵

We interpret this provision, and its legislative history, merely to acknowledge that mandatory carriage operates only with regard to broadcasters and cable operators and satellite carriers operating in the same DMA. As discussed above, retransmission consent carriage of significantly viewed signals is permissive. We do not interpret this provision as limiting the geographic scope of Section 325(b)(3)(C). Nor do we interpret as conflicting with this reading the fact that Congress, in Section 340(d), referenced Section 325(b)(1) of the Communications Act, rather than Section 325(B)(3)(C), the reciprocal bargaining obligation.⁹⁶ Section 325(b)(1) is the statutory provision that gives rise to the right of retransmission consent. It originates in the 1992 Cable Act and predates both the SHVIA and the SHVERA. The right of in-market broadcasters and out-of-market broadcasters alike to require retransmission consent arises from Section 325(b)(1). The reciprocal bargaining provision of Section 325(b)(3)(C) is an obligation that Congress deliberately overlay upon the substantive retransmission consent right created by Section 325(b)(1).

29. We emphasize that, although the reciprocal bargaining obligation applies without geographic limitation, that does not mean it will apply exactly the same way in all negotiations. Rather, we conclude that Section 325(b)(3)(C) and the inherent nature of a good faith obligation permit the Commission to account for the distinction between in-market and out-of-market signals in determining compliance under the totality of the circumstances test. In other words, the determination of what conduct constitutes a breach of the duty of good faith is necessarily contextual. Congress created the mandatory carriage/retransmission consent framework as part of the 1992 Cable Act.⁹⁷ Through this framework, a broadcaster has the option to elect mandatory carriage and forgo compensation for carriage of its signal or pursue retransmission consent and risk the failure to agree and non-carriage.⁹⁸ The mandatory carriage/retransmission consent option applies only to carriage within a broadcaster’s DMA.

⁹³ See House Report at 19.

⁹⁴ 47 U.S.C. § 340(d)(2).

⁹⁵ House Report at 14.

⁹⁶ See 47 U.S.C. § 325(b)(1).

⁹⁷ See *Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Broadcast Signal Carriage Issues*, 8 FCC Rcd 2965 (1993).

⁹⁸ *Id.*

In contrast, the carriage of significantly viewed signals outside of a broadcaster's DMA has always been, and continues to be under the SHVERA, solely at the agreement of the broadcaster and the out-of-market MVPD. Notwithstanding the uncertain nature of retransmission consent, we believe that broadcasters generally have a greater expectation of carriage within their local market. Notwithstanding this expectation, it is also possible, subject to certain limitations,⁹⁹ that a cable operator located in the New York DMA could through retransmission consent carry the signal of a broadcaster located in the San Diego DMA. We believe that a reasonable application of the statutory good faith standard permits variations in parties' reciprocal bargaining obligations in two such distinct situations.

30. With regard to significantly viewed signals and in-market signals, we believe that the reciprocal bargaining obligation should be essentially the same. In 1972, the Commission adopted the concept of significantly viewed signals to differentiate between out-of-market television stations "that have sufficient audience to be considered local and those that do not."¹⁰⁰ The copyright provisions that apply to cable systems have recognized the Commission's designation of stations as significantly viewed and treated them, for copyright purposes, as "local," and therefore subject to reduced copyright payment obligations.¹⁰¹ In the SHVERA, Congress extended to satellite carriers the right, already held by cable operators, to provide through retransmission consent out-of-market signals to the communities in which they are significantly viewed.¹⁰² Given the proximity of broadcasters to the communities in which they are significantly viewed, we can discern no reason to differentiate these signals from in-market signals for reciprocal bargaining purposes. In either situation, failure to reach retransmission consent is not a violation of the reciprocal bargaining obligation provided the parties comply with our rules. Because satellite carriers' retransmission consent rights apply only to in-market and significantly viewed signals, their reciprocal bargaining obligation applies only to retransmission of these signals.¹⁰³

31. The situation for cable operators beyond in-market and significantly viewed signals, however, is more complex. As discussed above, different statutory provisions govern cable operators and permit pursuant to retransmission consent the carriage of distant signals originating far beyond the boundaries of the cable operator's DMA. In these cases, although the reciprocal bargaining obligation still applies, we believe that the Commission should apply a different calculus in evaluating complaints involving cable operators and distant broadcasters. As with all retransmission consent negotiations, the per se negotiating standards set forth in Section 76.65 will still apply to such negotiations as will the requirement that both parties to the negotiation refrain from insisting on terms that are not consistent with competitive marketplace considerations. The main difference in these distant reciprocal bargaining negotiations should lie in either party's ability, after evaluating the prospect of distant carriage and giving full consideration to the proposals of the party requesting carriage, to reject the proposal and terminate further negotiation. We emphasize that until such negotiations are formally terminated, either orally or, preferably, in writing, the reciprocal bargaining obligation must be observed.

32. We believe that, in many cases, distance will play a critical factor in determining whether a party complied with its reciprocal bargaining obligation. In the example discussed above, if a San Diego broadcaster offered retransmission consent to a New York cable operator in exchange for a monthly consideration per subscriber, the cable operator after permitting the broadcaster to fully present its proposal and giving such proposal due consideration, would not violate its reciprocal bargaining

⁹⁹ Such as the invocation of network nonduplication and syndicated exclusivity rights of broadcasters in the MVPD's DMA.

¹⁰⁰ *Cable Television Report and Order*, 36 FCC 2d 143, 174 (1972).

¹⁰¹ See 17 U.S.C. § 111(a), (c) and (f).

¹⁰² 47 U.S.C. § 340.

¹⁰³ See 47 U.S.C. §§ 338, 339 & 340.

obligation by concluding that the distance between the broadcaster and cable operator is simply too great to make retransmission consent worthwhile to the cable operator. After so advising the broadcaster, the cable operator would have satisfied its reciprocal bargaining obligation. As the distances involved lessen, we would expect the party requested to engage in retransmission consent negotiations to be more willing to engage in extended negotiations to comply with the reciprocal bargaining requirement. In addressing reciprocal bargaining complaints involving distant carriage negotiations, the Commission will evaluate whether the party against whom the complaint is filed complied with the per se standards during the course of the negotiations. The length of the negotiation, the decision to terminate further negotiation and the distance between the broadcaster and the cable operator will be considered as part of the totality of the circumstances test. We believe that further guidance on this issue is best provided by the Commission through the resolution of actual disputes. At bottom, we do not believe that the reciprocal bargaining obligation should be used to engage distant entities and require protracted good faith negotiation for signals that have no logical or local relation to the MVPD's service area.

33. Certain commenters ask that the Commission declare a per se violation of a broadcaster's reciprocal bargaining obligation a contractual provision, such as one contained in a network affiliation agreement, that restricts a broadcaster's ability to negotiate retransmission consent in good faith. These commenters assert that some networks, through their affiliation agreements, restrict a broadcaster's ability to grant retransmission consent outside of a specified geographic area, often the broadcaster's DMA. NBC and the Network Affiliates assert that Congress has consistently acknowledged and preserved the network-affiliate system.¹⁰⁴ As the record indicates, Congress in the 1992 Cable Act, the SHVIA and the SHVERA stressed the importance of this system.¹⁰⁵ We agree with NBC and the Network Affiliates that neither the text nor the legislative history of the SHVIA or the SHVERA indicate a congressional intent to restrict the rights of networks and their affiliates through the good faith or reciprocal bargaining obligation to agree to limit an affiliate's right to redistribute affiliated programming.¹⁰⁶ This is reflected in the *Notice* in this proceeding which did not raise for comment the issue of the reciprocal bargaining obligation and its relation to the preclusion of retransmission consent through network-affiliate agreements. Because we perceive no intent on the part of Congress that the reciprocal bargaining obligation interfere with the network-affiliate relationship or to preclude specific terms contained in network-affiliate agreements, we decline to take action on these issues in this proceeding.¹⁰⁷ Even were we so inclined, we are concerned that the *Notice* in this proceeding may not have given interested parties appropriate notice that the Commission was contemplating action in this regard.¹⁰⁸ However, because we decline to take action for the reasons described above, we need not reach the issue of the sufficiency of our *Notice*.

¹⁰⁴ See NBC Comments at 2-4; Network Affiliates Reply Comments at 4-6.

¹⁰⁵ See *supra* nn. 64-66 (discussing Congress's protection of the rights of copyright holders and support for the network-affiliate relationship).

¹⁰⁶ See *supra* ¶ 20 (discussing the arguments of NBC and the Network Affiliates).

¹⁰⁷ We note that the issue of retransmission consent generally, and the impact of network affiliation agreements on retransmission consent specifically, is more squarely raised in a petition for rulemaking pending before the Commission. See *Petition for Rulemaking to Amend 47 C.F.R. §§ 76.64, 76.93, and 76.103: Retransmission Consent, Network Non-Duplication, and Syndicated Exclusivity*, RM 11203 (filed March 2, 2005). In addition Section 208 of the SHVERA requires the Commission to complete an inquiry and report to Congress regarding how the retransmission consent, network non-duplication, syndicated exclusivity and sports blackout rules impact MVPD competition, including the ability of rural cable operators to compete with satellite carriers in providing digital broadcast signals. SHVERA, Pub. L. No. 108-447, § 208. The Commission is currently preparing this report.

¹⁰⁸ See 5 U.S.C. § 553(b)(1)-(3) (Administrative Procedure Act notice requirements). See *Omnipoint Corp. v. FCC*, 78 F.3d 620, 631 (D.C. Cir. 1996) ("a final rule is not a logical outgrowth of a proposed rule 'when the changes are so major that the original notice did not adequately frame the subjects for discussion.'"), quoting *Connecticut Light and Power Co. v. NRC*, 673 F.2d 525, 533 (D.C. Cir.), *cert. denied*, 459 U.S. 835 (1982).

34. Nor do we agree that restrictions in existing network-affiliate agreements are prohibited by Section 76.65 of the Commission's rules. Section 76.65 provides that it is a per se violation of the good faith negotiation provision for a television broadcast station to execute "an agreement with any party, a term or condition of which, requires that such television broadcast station not enter into a retransmission consent agreement with any multichannel video programming distributor. . . ."¹⁰⁹ As is evidenced by the discussion in the *Good Faith Order*, that provision is intended to cover collusion between a broadcaster and an MVPD requiring non-carriage by another MVPD, "[f]or example, Broadcaster A is prohibited from agreeing with MVPD B that it will not reach retransmission consent with MVPD C."¹¹⁰ In adopting Section 76.65(b)(1)(iv), the Commission did not intend to affect the ability of a network affiliate agreement to limit redistribution of network programming.¹¹¹

35. The question arises, however, what is a broadcaster's reciprocal bargaining obligation with regard to MVPDs which it is precluded from granting retransmission consent by its network affiliation agreement. As discussed above, the reciprocal bargaining obligation imposes a "heightened duty of negotiation" on broadcasters and MVPDs involved in retransmission consent negotiations. We believe that it is incumbent on broadcasters subject to such contractual limitations that have been engaged by an out-of-market MVPD to negotiate retransmission consent of its signal to at least inquire with its network whether the network would waive the limitation with regard to the MVPD in question. We believe that in many situations retransmission of the broadcaster's signal by a distant MVPD would be deemed advantageous to the network as well as the broadcaster and MVPD. In such situations, we believe that a network that has otherwise restricted a broadcaster's redistribution rights might be amenable to a limited waiver of the restriction.

36. With respect to EchoStar's contention that local broadcasters are beginning to demand that MVPDs contract away their right to import significantly viewed out-of-DMA stations as part of retransmission consent negotiations, we reiterate our conclusion in the *Good Faith Order* that "[p]roposals that specifically foreclose carriage of other programming services by the MVPD that do not substantially duplicate the proposing broadcaster's programming" are "not consistent with competitive marketplace considerations and the good faith negotiation requirement. . . ."¹¹² If complaints are filed on this issue, we will evaluate as part of the totality of the circumstances whether or not the programming sought to be foreclosed actually substantially duplicates the programming of the broadcaster negotiating retransmission consent.

IV. PROCEDURAL MATTERS

A. Regulatory Flexibility Analysis

37. The Final Regulatory Flexibility Analysis is attached to this *Order* as Appendix C.

¹⁰⁹ 47 C.F.R. § 76.65(b)(1)(vi).

¹¹⁰ *Good Faith Order*, 15 FCC Rcd at 5464.

¹¹¹ See *Monroe*, 19 FCC Rcd at 13997 n.24 ("To the extent, however, that Monroe Utilities is arguing that the existence of an underlying agreement between Morris and NBC is itself a violation of the good faith negotiation requirement, we agree with Morris that the good faith requirement applies to negotiations between MVPDs and broadcast stations, and not between a network and an affiliate.").

¹¹² *Good Faith Order*, 15 FCC Rcd at 5470.

B. Paperwork Reduction Act of 1995 Analysis

38. This document does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified "information collection burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4).

C. Congressional Review Act

39. The Commission will send a copy of this *Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

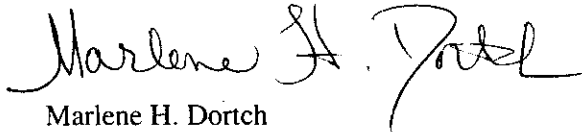
V. ORDERING CLAUSES

40. Accordingly, **IT IS ORDERED** that pursuant to Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004, and Sections 1, 4(i) and (j), and 325 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and (j), and 325, the Commission's rules **ARE HEREBY AMENDED** as set forth in Appendix A.

41. **IT IS FURTHER ORDERED** that the rule amendments set forth in Appendix A **WILL BECOME EFFECTIVE** 30 days after publication in the Federal Register.

42. **IT IS FURTHER ORDERED** that the Reference Information Center, Consumer and Governmental Affairs Bureau, shall send a copy of this Report and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION



Marlene H. Dortch
Secretary

APPENDIX A

Part 76 of Title 47 of the Code of Federal Regulations is amended as follows:

Part 76 – Multichannel Video and Cable Television Service

1. The authority citation for Part 76 continues to read as follows:

AUTHORITY: 47 U.S.C. 151, 152, 153, 154, 301, 302, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 503, 521, 522, 531, 532, 533, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572, 573.

2. Section 76.64(l) is amended as follows:

§ 76.64 Retransmission Consent.

(l) Exclusive retransmission consent agreements are prohibited. No television broadcast station shall make or negotiate any agreement with one multichannel video programming distributor for carriage to the exclusion of other multichannel video programming distributors. This paragraph shall terminate at midnight on December 31, 2009.

3. Section 76.65 is amended as follows:

§ 76.65 Good Faith and Exclusive Retransmission Consent Complaints.

(a) *Duty to Negotiate in Good Faith.* Television broadcast stations and multichannel video programming distributors shall negotiate in good faith the terms and conditions of retransmission consent agreements to fulfill the duties established by section 325(b)(3)(C) of the Act; provided, however, that it shall not be a failure to negotiate in good faith if: (1) the television broadcast station proposes or enters into retransmission consent agreements containing different terms and conditions, including price terms, with different multichannel video programming distributors if such different terms and conditions are based on competitive marketplace considerations; or (2) the multichannel video programming distributor enters into retransmission consent agreements containing different terms and conditions, including price terms, with different broadcast stations if such different terms and conditions are based on competitive marketplace considerations. If a television broadcast station or multichannel video programming distributor negotiates in accordance with the rules and procedures set forth in this section, failure to reach an agreement is not an indication of a failure to negotiate in good faith.

(b) *Good Faith Negotiation.*

(1) *Standards.* The following actions or practices violate a broadcast television station's or multichannel video programming distributor's (the "Negotiating Entity") duty to negotiate retransmission consent agreements in good faith:

- (i) Refusal by a Negotiating Entity to negotiate retransmission consent;
- (ii) Refusal by a Negotiating Entity to designate a representative with authority make binding representations on retransmission consent;
- (iii) Refusal by a Negotiating Entity to meet and negotiate retransmission consent at reasonable times and locations, or acting in a manner that unreasonably delays retransmission consent negotiations;
- (iv) Refusal by a Negotiating Entity to put forth more than a single, unilateral proposal;

- (v) Failure of a Negotiating Entity to respond to a retransmission consent proposal of the other party, including the reasons for the rejection of any such proposal;
- (vi) Execution by a Negotiating Entity of an agreement with any party, a term or condition of which, requires that such Negotiating Entity not enter into a retransmission consent agreement with any other television broadcast station or multichannel video programming distributor; and
- (vii) Refusal by a Negotiating Entity to execute a written retransmission consent agreement that sets forth the full understanding of the television broadcast station and the multichannel video programming distributor.

(2) *Totality of the circumstances.* In addition to the standards set forth in subsection 76.65(b)(1), a Negotiating Entity may demonstrate, based on the totality of the circumstances of a particular retransmission consent negotiation, that a television broadcast station or multichannel video programming distributor breached its duty to negotiate in good faith as set forth in subsection 76.65(a).

(c) *Good Faith Negotiation and Exclusivity Complaints.* Any television broadcast station or multichannel video programming distributor aggrieved by conduct that it believes constitutes a violation of the regulations set forth in this section or subsection 76.64(1) may commence an adjudicatory proceeding at the Commission to obtain enforcement of the rules through the filing of a complaint. The complaint shall be filed and responded to in accordance with the procedures specified in Section 76.7 of this part.

(d) *Burden of proof.* In any complaint proceeding brought under this section, the burden of proof as to the existence of a violation shall be on the complainant.

(e) *Time limit on filing of complaints.* Any complaint filed pursuant to this subsection must be filed within one year of the date on which one of the following events occurs:

- (1) a complainant enters into a retransmission consent agreement with a television broadcast station or multichannel video programming distributor that the complainant alleges to violate one or more of the rules contained in this subpart; or
 - (2) a television broadcast station or multichannel video programming distributor engages in retransmission consent negotiations with a complainant that the complainant alleges to violate one or more of the rules contained in this subpart, and such negotiation is unrelated to any existing contract between the complainant and the television broadcast station or multichannel video programming distributor; or
 - (3) the complainant has notified the television broadcast station or multichannel video programming distributor that it intends to file a complaint with the Commission based on a request to negotiate retransmission consent that has been denied, unreasonably delayed, or unacknowledged in violation of one or more of the rules contained in this subpart.
- (f) *Termination of rules.* This section shall terminate at midnight on December 31, 2009.

APPENDIX B**Commenters and Reply Commenters****Comments:**

ABC, CBS, FBC and NBC Television Affiliate Associations ("Network Affiliates")
American Cable Association ("ACA")
EchoStar Satellite L.L.C. ("EchoStar")
National Association of Broadcasters ("NAB")
National Cable & Telecommunications Association ("NCTA")
NBC Telemundo License Co. ("NBC")

Reply Comments:

ABC, CBS, FBC and NBC Television Affiliate Associations ("Network Affiliates")
American Cable Association ("ACA")
DIRECTV, Inc. ("DirecTV")
EchoStar Satellite L.L.C. ("EchoStar")
National Association of Broadcasters ("NAB")
National Cable & Telecommunications Association ("NCTA")
NBC Telemundo License Co. ("NBC")

APPENDIX C

Final Regulatory Flexibility Analysis

As required by the Regulatory Flexibility Act of 1980, as amended (RFA),¹¹³ an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004: Reciprocal Bargaining Obligations* ("Notice").¹¹⁴ The Commission sought written public comment on the proposals in the Notice, including comment on the IRFA. The comments received are discussed below. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.¹¹⁵

A. Need for, and Objectives of, the Order

Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004 ("SHVERA") extends Section 325(b)(3)(C) of the Communications Act until 2010 and amends that section to impose reciprocal good faith retransmission consent bargaining obligations on multichannel video programming distributors ("MVPDs").¹¹⁶ This section alters the bargaining obligations created by the Satellite Home Viewer Improvement Act of 1999 ("SHVIA"), which imposed a good faith bargaining obligation only on broadcasters.¹¹⁷ This Order achieves these statutory objectives by adopting rule changes to Part 76 of the Commission's rules to implement Section 325(b)(3)(C).¹¹⁸

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

The American Cable Association ("ACA"), the trade association for small and rural cable operators, was the only entity that filed comments specifically in response to the Initial Regulatory Flexibility Act Analysis that accompanied the Notice that initiated this proceeding. ACA's comments and the Commission's response thereto are discussed in Part E of this FRFA.

C. Description and Estimate of the Number of Small Entities to Which the Rules Will Apply

The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by rules changes.¹¹⁹ The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small government jurisdiction."¹²⁰ In addition, the term "small business" has the same meaning as the term

¹¹³ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. § 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

¹¹⁴ Notice, FCC 05-49 at p. 9 (rel. March 7, 2005).

¹¹⁵ See 5 U.S.C. § 604.

¹¹⁶ The Satellite Home Viewer Extension and Reauthorization Act of 2004, Pub. L. No. 108-447, § 207, 118 Stat. 2809, 3393 (2004) (to be codified at 47 U.S.C. § 325). The SHVERA was enacted on December 8, 2004 as title IX of the "Consolidated Appropriations Act, 2005."

¹¹⁷ SHVIA was enacted as title I of the Intellectual Property and Communications Omnibus Reform Act of 1999 (relating to copyright licensing and carriage of broadcast signals by satellite carriers, codified in scattered sections of 17 and 47 U.S.C.), PL 106-113, 113 Stat. 1501, Appendix I (1999).

¹¹⁸ See proposed rules contained in Appendix A to this Notice.

¹¹⁹ 5 U.S.C. § 603(b)(3).

¹²⁰ 5 U.S.C. § 601(6).

“small business concern” under the Small Business Act.¹²¹ A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.¹²²

The rules adopted in the *Order*, as required by statute, require MVPDs to negotiate retransmission consent in good faith with television broadcast stations.¹²³ Therefore, “MVPDs,” which includes cable and other program distributors and satellite carriers, will be directly and primarily affected by the rules. In addition, because Section 207 also extends until 2010 the good faith negotiation obligations of broadcasters, we believe the rules will also directly affect television broadcast stations. Therefore, in this FRFA, we consider the impact of the rules on small television broadcast stations, small cable and satellite operators, and other small entities. A description of such small entities, as well as an estimate of the number of such small entities, is provided below.

Cable and Other Program Distribution. Cable system operators fall within the SBA-recognized definition of Cable and Other Program Distribution, which includes all such companies generating \$12.5 million or less in revenue annually.¹²⁴ According to the Census Bureau data for 1997, there were a total of 1,311 firms that operated for the entire year in the category of Cable and Other Program Distribution. Of this total, 1,180 firms had annual receipts of under \$10 million and an additional 52 firms had receipts of \$10 million or more, but less than \$25 million.¹²⁵ The Commission therefore estimates that the majority of providers in this category of Cable and Other Program Distribution are small businesses.

Cable System Operators (Rate Regulation Standard). The Commission has developed, with SBA’s approval, its own definition of a small cable system operator for the purposes of rate regulation. Under the Commission’s rules, a “small cable company” is one serving 400,000 or fewer subscribers nationwide.¹²⁶ We last estimated that there were 1,439 cable operators that qualified as small cable companies at the end of 1995.¹²⁷ Since then, some of those companies may have grown to serve more

¹²¹ 5 U.S.C. § 601(3) (incorporating by reference the definition of “small business concern” in 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.” 5 U.S.C. § 601(3).

¹²² 15 U.S.C. § 632. Application of the statutory criteria of dominance in its field of operation and independence are sometimes difficult to apply in the context of broadcast television. Accordingly, the Commission’s statistical account of television stations may be over-inclusive.

¹²³ See, *supra*, Section II of the *Notice*; see also 47 U.S.C. § 325(b)(3)(C).

¹²⁴ 13 C.F.R. § 121.201, NAICS code 517510.

¹²⁵ U.S. Census Bureau, 1997. Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, 1997 Economic Census, Subject Series – Establishment and Firm Size, Information Sector 51, Table 4 at 50 (2000). The amount of \$10 million was used to estimate the number of small business firms because the relevant Census categories stopped at \$9,999,999 and began at \$10,000,000. No category for \$12.5 million existed. Thus, the number is as accurate as it is possible to calculate with the available information.

¹²⁶ 47 C.F.R. § 76.901(e). The Commission developed this definition based on its determinations that a small cable system operator is one with annual revenues of \$100 million or less. For “regulatory simplicity,” the Commission established the company size standard in terms of subscribers, rather than dollars; in the cable context, \$100 million in annual regulated revenues equates to approximately 400,000 subscribers. See *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Doc. Nos. 92-266 and 93-215, *Sixth Report and Order and Eleventh Order on Reconsideration*, 10 FCC Rcd 7393, 7408-7409, ¶¶ 28-30 (1995).

¹²⁷ Paul Kagan Associates, Inc., Cable TV Investor, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

than 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, we estimate that there are fewer than 1,439 small entity cable system operators that may be affected by the proposals contained in this *Notice*.

Cable System Operators (Telecom Act Standard). The Communications Act of 1934, as amended, also contains a size standard for a “small cable operator,” which is “a cable operator that, directly or through an affiliate, serves in the aggregate fewer than one percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000.”¹²⁸ The Commission has determined that there are 67.7 million subscribers in the United States.¹²⁹ Therefore, an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all of its affiliates, do not exceed \$250 million in the aggregate.¹³⁰ Based on available data, we estimate that the number of cable operators serving 677,000 subscribers or less totals approximately 1,450. The Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million,¹³¹ and therefore is unable at this time to estimate more accurately the number of cable system operators that would qualify as small cable operators under the size standard contained in the Communications Act.

Satellite Carriers. The SHVERA defines the term “satellite carrier” by reference to the definition in the copyright title 17.¹³² This definition includes entities providing services as described in 17 U.S.C. § 119(d)(6) using the facilities of a satellite or satellite service licensed under Part 25 of the Commission’s rules to operate in Direct Broadcast Satellite (DBS) or Fixed-Satellite Service (FSS) frequencies.¹³³ As a general practice, not mandated by any regulation, DBS licensees usually own and operate their own satellite facilities as well as package the programming they offer to their subscribers. In contrast, satellite carriers using FSS facilities often lease capacity from another entity that is licensed to operate the satellite used to provide service to subscribers. These entities package their own programming and may or may not be Commission licensees themselves. In addition, a third situation may include an entity using a non-U.S. licensed satellite to provide programming to subscribers in the United States pursuant to a blanket earth station license.¹³⁴

¹²⁸ 47 U.S.C. § 543(m)(2).

¹²⁹ See Public Notice, “FCC Announces New Subscriber Count for the Definition of Small Cable Operator,” 16 FCC Rcd 2225 (2001) (“2001 Subscriber Count PN”). In this Public Notice, the Commission established the threshold for determining whether a cable operator meets the definition of small cable operator at 677,000 subscribers, and determined that this threshold will remain in effect until the Commission issues a superceding Public Notice. We recognize that the number of cable subscribers was recently estimated by the Commission to be almost 66.1 million, as of June 2004; see 2005 Cable Competition Report, FCC 05-13, ¶¶ 9, 21. However, because the Commission has not issued a public notice subsequent to the 2001 Subscriber Count PN, we propose to rely on the subscriber count threshold established by the 2001 Subscriber Count PN.

¹³⁰ 47 C.F.R. § 76.901(f).

¹³¹ The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority’s finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission’s rules. See 47 U.S.C. § 573.

¹³² See 47 U.S.C. § 340(i)(1); 47 U.S.C. § 338(k)(3), as amended by the SHVERA, and 17 U.S.C. § 119(d)(6).

¹³³ Part 100 of the Commission’s rules was eliminated in 2002 and now both FSS and DBS satellite facilities are licensed pursuant to Part 25 of the rules. *Policies and Rules for the Direct Broadcast Satellite Service*, 17 FCC Rcd 11331 (2002); 47 C.F.R. § 25.148.

¹³⁴ See, e.g., *Application Of DirecTV Enterprises, LLC, Request For Special Temporary Authority for the DirecTV 5 Satellite*; *Application Of DirecTV Enterprises, LLC, Request for Blanket Authorization for 1,000,000 Receive Only* (continued....)

The SBA has developed a small business size standard for Satellite Telecommunications, which consists of all such firms having \$12.5 million or less in annual receipts.¹³⁵ According to Census Bureau data for 1997, in this category there was a total of 324 firms that operated for the entire year.¹³⁶ Of this total, 273 firms had annual receipts of under \$10 million, and an additional twenty-four firms had receipts of \$10 million to \$24,999,999.¹³⁷ Thus, under this size standard, the majority of firms can be considered small.

Direct Broadcast Satellite ("DBS") Service. DBS service is a nationally distributed subscription service that delivers video and audio programming via satellite to a small parabolic "dish" antenna at the subscriber's location. Because DBS provides subscription services, DBS falls within the SBA-recognized definition of Cable and Other Program Distribution.¹³⁸ This definition provides that a small entity is one with \$12.5 million or less in annual receipts.¹³⁹ Currently, only four operators hold licenses to provide DBS service, which requires a great investment of capital for operation. All four currently offer subscription services. Two of these four DBS operators, DirecTV¹⁴⁰ and EchoStar Communications Corporation ("EchoStar"),¹⁴¹ report annual revenues that are in excess of the threshold for a small business. A third operator, Rainbow DBS, is a subsidiary of Cablevision's Rainbow Network, which also reports annual revenues in excess of \$12.5 million, and thus does not qualify as a small business.¹⁴² The fourth DBS operator, Dominion Video Satellite, Inc. ("Dominion"), offers religious (Christian) programming and does not report its annual receipts.¹⁴³ The Commission does not know of any source which provides this information and, thus, we have no way of confirming whether Dominion qualifies as a small business. Because DBS service requires significant capital, we believe it is unlikely that a small entity as defined by the SBA would have the financial wherewithal to become a DBS licensee. Nevertheless, given the absence of specific data on this point, we acknowledge the possibility that there are entrants in this field that may not yet have generated \$12.5 million in annual receipts, and therefore may be categorized as a small business, if independently owned and operated.

Fixed-Satellite Service ("FSS"). The FSS is a radiocommunication service between earth stations at a specified fixed point or between any fixed point within specified areas and one or more satellites.¹⁴⁴ The FSS, which utilizes many earth stations that communicate with one or more space

(...continued from previous page)

Earth Stations to Provide Direct Broadcast Satellite Service in the U.S. using the Canadian Authorized DirecTV 5 Satellite at the 72.5° W.L. Broadcast Satellite Service Location, 19 FCC Rcd. 15529 (Sat. Div. 2004).

¹³⁵ 13 C.F.R. § 121.201, NAICS code 517410 (changed from 513340 in October 2002).

¹³⁶ U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 4, NAICS code 513340 (issued October 2000).

¹³⁷ *Id.*

¹³⁸ 13 C.F.R. § 121.201, NAICS code 517510.

¹³⁹ *Id.*

¹⁴⁰ DirecTV is the largest DBS operator and the second largest MVPD, serving an estimated 13.04 million subscribers nationwide; see Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Eleventh Annual Report*, FCC 05-13, ¶ 55 (rel. Feb. 4, 2005) ("2005 Cable Competition Report").

¹⁴¹ EchoStar, which provides service under the brand name Dish Network, is the second largest DBS operator and the fourth largest MVPD, serving an estimated 10.12 million subscribers nationwide. *Id.*

¹⁴² Rainbow DBS, which provides service under the brand name VOOM, reported an estimated 25,000 subscribers. *Id.*

¹⁴³ Dominion, which provides service under the brand name Sky Angel, does not publicly disclose its subscribership numbers on an annualized basis. *Id.*

¹⁴⁴ See 47 C.F.R. § 2.1(c).

stations, may be used to provide subscription video service. Therefore, to the extent FSS frequencies are used to provide subscription services, FSS falls within the SBA-recognized definition of Cable and Other Program Distribution, which includes all such companies generating \$12.5 million or less in revenue annually.¹⁴⁵ Although a number of entities are licensed in the FSS, not all such licensees use FSS frequencies to provide subscription services. Two of the DBS licensees (EchoStar and DirecTV) have indicated interest in using FSS frequencies to broadcast signals to subscribers. It is possible that other entities could similarly use FSS frequencies, although we are not aware of any entities that might do so.

Private Cable Operators (PCOs) also known as Satellite Master Antenna Television (SMATV) Systems. PCOs, also known as SMATV systems or private communication operators, are video distribution facilities that use closed transmission paths without using any public right-of-way. PCOs acquire video programming and distribute it via terrestrial wiring in urban and suburban multiple dwelling units such as apartments and condominiums, and commercial multiple tenant units such as hotels and office buildings. The SBA definition of small entities for Cable and Other Program Distribution Services includes PCOs and, thus, small entities are defined as all such companies generating \$12.5 million or less in annual receipts.¹⁴⁶ Currently, there are approximately 135 members in the Independent Multi-Family Communications Council (IMCC), the trade association that represents PCOs.¹⁴⁷ Individual PCOs often serve approximately 3,000-4,000 subscribers, but the larger operations serve as many as 15,000-55,000 subscribers. In total, PCOs currently serve approximately 1.1 million subscribers.¹⁴⁸ Because these operators are not rate regulated, they are not required to file financial data with the Commission. Furthermore, we are not aware of any privately published financial information regarding these operators. Based on the estimated number of operators and the estimated number of units served by the largest ten PCOs, we believe that a substantial number of PCO qualify as small entities.

Other Program Distribution. The SBA-recognized definition of Cable and Other Program Distribution includes these other MVPDs, such as HSD, MDS/MMDS, ITFS, LMDS and OVS. This definition provides that a small entity is one with \$12.5 million or less in annual receipts.¹⁴⁹ As previously noted, according to the Census Bureau data for 1997, there were a total of 1,311 firms that operated for the entire year in the category of Cable and Other Program Distribution. Of this total, 1,180 firms had annual receipts of under \$10 million and an additional 52 firms had receipts of \$10 million or more, but less than \$25 million.¹⁵⁰ The Commission therefore estimates that the majority of providers in this category of Cable and Other Program Distribution are small businesses.

Home Satellite Dish ("HSD") Service. Because HSD provides subscription services, HSD falls within the SBA-recognized definition of Cable and Other Program Distribution, which includes all such companies generating \$12.5 million or less in revenue annually.¹⁵¹ HSD or the large dish segment of the

¹⁴⁵ 13 C.F.R. § 121.201, NAICS code 517510.

¹⁴⁶ 13 C.F.R. § 121.201, NAICS code 517510.

¹⁴⁷ See 2005 Cable Competition Report, FCC 05-13, ¶ 110. Previously, the Commission reported that IMCC had 250 members; see Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Tenth Annual Report, 19 FCC Rcd 1606, 1666, ¶ 90 (2004) ("2004 Cable Competition Report").

¹⁴⁸ See 2005 Cable Competition Report, FCC 05-13, ¶¶ 110.

¹⁴⁹ 13 C.F.R. § 121.201, NAICS code 517510. This NAICS code applies to all services listed in this paragraph.

¹⁵⁰ U.S. Census Bureau, 1997. Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, 1997 Economic Census, Subject Series – Establishment and Firm Size, Information Sector 51, Table 4 at 50 (2000). The amount of \$10 million was used to estimate the number of small business firms because the relevant Census categories stopped at \$9,999,999 and began at \$10,000,000. No category for \$12.5 million existed. Thus, the number is as accurate as it is possible to calculate with the available information.

¹⁵¹ 13 C.F.R. § 121.201, NAICS code 517510.

satellite industry is the original satellite-to-home service offered to consumers, and involves the home reception of signals transmitted by satellites operating generally in the C-band frequency. Unlike DBS, which uses small dishes, HSD antennas are between four and eight feet in diameter and can receive a wide range of unscrambled (free) programming and scrambled programming purchased from program packagers that are licensed to facilitate subscribers' receipt of video programming. There are approximately 30 satellites operating in the C-band, which carry over 500 channels of programming combined; approximately 350 channels are available free of charge and 150 are scrambled and require a subscription. HSD is difficult to quantify in terms of annual revenue. HSD owners have access to program channels placed on C-band satellites by programmers for receipt and distribution by MVPDs. Commission data shows that, between June 2003, and June 2004, HSD subscribership fell from 502,191 subscribers to 335,766 subscribers, a decline of more than 33 percent.¹⁵² The Commission has no information regarding the annual revenue of the four C-Band distributors.

Wireless Cable Systems. Wireless cable systems use the Multipoint Distribution Service ("MDS")¹⁵³ and Instructional Television Fixed Service ("ITFS")¹⁵⁴ frequencies in the 2 GHz band to transmit video programming and provide broadband services to subscribers. Local Multipoint Distribution Service ("LMDS") is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications.¹⁵⁵ As previously noted, the SBA definition of small entities for Cable and Other Program Distribution, which includes such companies generating \$12.5 million in annual receipts, appears applicable to MDS, ITFS and LMDS. In addition, the Commission has defined small MDS and LMDS entities in the context of Commission license auctions.

In the 1996 MDS auction,¹⁵⁶ the Commission defined a small business as an entity that had annual average gross revenues of less than \$40 million in the previous three calendar years.¹⁵⁷ This definition of a small entity in the context of MDS auctions has been approved by the SBA.¹⁵⁸ In the MDS auction, 67 bidders won 493 licenses. Of the 67 auction winners, 61 claimed status as a small business. At this time, the Commission estimates that of the 61 small business MDS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent MDS licensees that have gross revenues that are not more than \$40 million

¹⁵² See *2005 Cable Competition Report*, FCC 05-13, ¶ 64. HSD subscribership declined more than 28 percent between June 2002 and June 2003. See *2004 Cable Competition Report*, 19 FCC Rcd 1654-55, ¶¶ 73-4.

¹⁵³ MDS, also known as Multichannel Multipoint Distribution Service ("MMDS"), is regulated by Part 21 of the Commission's rules; see 47 C.F.R. Part 21, subpart K; and has been renamed the Broadband Radio Service (BRS); see Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands; Part 1 of the Commission's Rules - Further Competitive Bidding Procedures; Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and the Instructional Television Fixed Service Amendment of Parts 21 and 74 to Engage in Fixed Two-Way Transmissions; Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Licensing in the Multipoint Distribution Service and in the Instructional Television Fixed Service for the Gulf of Mexico; 19 FCC Rcd 14165 (2004) ("*MDS/ITFS Order*").

¹⁵⁴ ITFS systems are regulated by Part 74 of the Commission's rules; see 47 C.F.R. Part 74, subpart I. ITFS, an educational service, has been renamed the Educational Broadband Service (EBS); see *MDS/ITFS Order*, 19 FCC Rcd 14165. ITFS licensees, however, are permitted to lease spectrum for MDS operation.

¹⁵⁵ See Local Multipoint Distribution Service, 12 FCC Rcd 12545 (1997) ("*LMDS Order*").

¹⁵⁶ MDS Auction No. 6 began on November 13, 1995, and closed on March 28, 1996. (67 bidders won 493 licenses.)

¹⁵⁷ 47 C.F.R. § 21.961(b)(1).

¹⁵⁸ See *ITFS Order*, 10 FCC Rcd at 9589.

and are thus considered small entities.¹⁵⁹ MDS licensees and wireless cable operators that did not participate in the MDS auction must rely on the SBA definition of small entities for Cable and Other Program Distribution. Information available to us indicates that there are approximately 850 of these licensees and operators that do not generate revenue in excess of \$12.5 million annually. Therefore, we estimate that there are approximately 850 small MDS providers as defined by the SBA and the Commission's auction rules.

While SBA approval for a Commission-defined small business size standard applicable to ITFS is pending, educational institutions are included in this analysis as small entities.¹⁶⁰ There are currently 2,032 ITFS licensees, and all but 100 of these licenses are held by educational institutions. Thus, the Commission estimates that at least 1,932 ITFS licensees are small businesses.

In the 1998 and 1999 LMDS auctions,¹⁶¹ the Commission defined a small business as an entity that had annual average gross revenues of less than \$40 million in the previous three calendar years.¹⁶² Moreover, the Commission added an additional classification for a "very small business," which was defined as an entity that had annual average gross revenues of less than \$15 million in the previous three calendar years.¹⁶³ These definitions of "small business" and "very small business" in the context of the LMDS auctions have been approved by the SBA.¹⁶⁴ In the first LMDS auction, 104 bidders won 864 licenses. Of the 104 auction winners, 93 claimed status as small or very small businesses. In the LMDS re-auction, 40 bidders won 161 licenses. Based on this information, we believe that the number of small LMDS licenses will include the 93 winning bidders in the first auction and the 40 winning bidders in the re-auction, for a total of 133 small entity LMDS providers as defined by the SBA and the Commission's auction rules.

In sum, there are approximately a total of 2,000 MDS/MMDS/LMDS stations currently licensed. Of the approximate total of 2,000 stations, we estimate that there are 1,595 MDS/MMDS/LMDS providers that are small businesses as deemed by the SBA and the Commission's auction rules.

Open Video Systems ("OVS"). The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,¹⁶⁵ OVS falls within the SBA-recognized definition of Cable and Other Program Distribution Services, which provides that a small entity is one with \$12.5 million or less in annual receipts.¹⁶⁶ The Commission has certified 25 OVS operators with some now providing service. Broadband service

¹⁵⁹ 47 U.S.C. § 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standards for "other telecommunications" (annual receipts of \$12.5 million or less). See 13 C.F.R. § 121.201, NAICS code 517910.

¹⁶⁰ In addition, the term "small entity" under SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)-(6). We do not collect annual revenue data on ITFS licensees.

¹⁶¹ The Commission has held two LMDS auctions: Auction 17 and Auction 23. Auction No. 17, the first LMDS auction, began on February 18, 1998, and closed on March 25, 1998. (104 bidders won 864 licenses.) Auction No. 23, the LMDS re-auction, began on April 27, 1999, and closed on May 12, 1999. (40 bidders won 161 licenses.)

¹⁶² See *LMDS Order*, 12 FCC Rcd at 12545.

¹⁶³ *Id.*

¹⁶⁴ See Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau (FCC) from A. Alvarez, Administrator, SBA (January 6, 1998).

¹⁶⁵ See 47 U.S.C. § 573.

¹⁶⁶ 13 C.F.R. § 121.201, NAICS code 517510.

providers (BSPs) are currently the only significant holders of OVS certifications or local OVS franchises, even though OVS is one of four statutorily-recognized options for local exchange carriers (LECs) to off video programming services.¹⁶⁷ As of June 2003, BSPs served approximately 1.4 million subscribers, representing 1.49 percent of all MVPD households.¹⁶⁸ Among BSPs, however, those operating under the OVS framework are in the minority, with approximately eight percent operating with an OVS certification.¹⁶⁹ Serving approximately 460,000 of these subscribers, Affiliates of Residential Communications Network, Inc. ("RCN") is currently the largest BSP and 11th largest MVPD.¹⁷⁰ RCN received approval to operate OVS systems in New York City, Boston, Washington, D.C. and other areas. The Commission does not have financial information regarding the entities authorized to provide OVS, some of which may not yet be operational. We thus believe that at least some of the OVS operators may qualify as small entities.

Television Broadcasting. The SBA defines a television broadcasting station as a small business if such station has no more than \$12 million in annual receipts.¹⁷¹ Business concerns included in this industry are those "primarily engaged in broadcasting images together with sound."¹⁷² According to Commission staff review of the BIA Publications, Inc. Master Access Television Analyzer Database as of June 26, 2004, about 860 of the 1,270 commercial television stations in the United States have revenues of \$12 million or less. We note, however, that, in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations¹⁷³ must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. There are also 2,127 low power television stations (LPTV).¹⁷⁴ Given the nature of this service, we will presume that all LPTV licensees qualify as small entities under the SBA definition.

In addition, an element of the definition of "small business" is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply do not exclude any television station from the definition of a small business on this basis and are therefore over-inclusive to that extent. Also as noted, an additional element of the definition of "small business" is that the entity must be independently owned and operated.

¹⁶⁷ See 2005 Cable Competition Report, FCC 05-13, ¶ 71.

¹⁶⁸ See 2004 Cable Competition Report, 19 FCC Rcd at 1659-60, ¶¶ 80-1.

¹⁶⁹ See 2005 Cable Competition Report, FCC 05-13, ¶ 71.

¹⁷⁰ *Id.* WideOpenWest is the second largest BSP and 15th largest MVPD, with cable systems serving about 288,000 subscribers as of September 2003. The third largest BSP is Knology, which currently serves approximately 174,957 subscribers as of June 2004; see 2005 Cable Competition Report, FCC 05-13, ¶ 71.

¹⁷¹ See 13 C.F.R. § 121.201, NAICS Code 515120 (adopted Oct. 2002).

¹⁷² NAICS Code 515120. This category description continues, "These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public. These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studios, from an affiliated network, or from external sources." Separate census categories pertain to businesses primarily engaged in producing programming. See Motion Picture and Video Production, NAICS code 512110; Motion Picture and Video Distribution, NAICS Code 512120; Teleproduction and Other Post-Production Services, NAICS Code 512191; and Other Motion Picture and Video Industries, NAICS Code 512199.

¹⁷³ "[Business concerns] are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has to power to control both." 13 C.F.R. § 121.103(a)(1).

¹⁷⁴ FCC News Release, "Broadcast Station Totals as of September 30, 2002."

We note that it is difficult at times to assess these criteria in the context of media entities and our estimates of small businesses to which they apply may be over-inclusive to this extent.

Entities Not Directly Affected By Proposed Rules: Because the scope of Section 207 broadly impacts television broadcast stations and MVPDs, we believe that all of the entities, large and small, that are impacted by Section 207 are directly impacted. Nevertheless, although not required by the RFA, we invited comment from any other small entity which may be indirectly impacted from our proposed implementation of Section 207, but only to the extent that the impact on small entities can be minimized while fully implementing that section. No comments were filed.

D. Description of Projected Reporting, Record Keeping and other Compliance Requirements for Small Entities

Section 207 of the SHVERA was enacted to extend Section 325(b)(3)(C) of the Communications Act until 2010 and amend that section to impose reciprocal good faith retransmission consent bargaining obligations on MVPDs. The rule changes that we believe will directly affect reporting, recordkeeping and other compliance requirements are described below.¹⁷⁵

This *Order* adopts rules that require MVPDs to negotiate retransmission consent in good faith in conformance with Section 325(b)(3)(C) of the Communications Act and amended Section 76.65 of the Commission's rules. Section 76.65 of the Commission's rules is already in place and applicable to broadcasters.¹⁷⁶ The *Order* only imposes these same rules on MVPDs.

This *Order* further requires that MVPDs bringing good faith complaints pursuant to Section 325 follow the same petition process now in place for broadcasters, as required by Sections 76.5, 76.7 and 76.65 of the Commission's rules.¹⁷⁷ Therefore, entities seeking a good faith determination would file a complaint pursuant to the pleading requirements in Section 76.7(a)(2) and use the methods described in Section 76.65 to demonstrate a violation of Section 325(B)(3)(C).

Furthermore, the *Order* determines that the reciprocal bargaining obligation applies to all retransmission consent negotiations whether between entities located in the same designated market area ("DMA")¹⁷⁸ or entities located in different DMAs.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or

¹⁷⁵ See proposed rules contained in Appendix A to this Notice.

¹⁷⁶ See, e.g., *supra* ¶ 3 of the Notice (negotiation standards).

¹⁷⁷ See 47 C.F.R. §§ 76.5, 76.7, 76.65; see also, *supra*, Section II of the Notice.

¹⁷⁸ A DMA is a geographic market designation created by Nielsen Media Research that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included. For a more complete description of how counties are allocated, see Nielsen Media Research's *Nielsen Station Index: Methodology Techniques and Data Interpretation*.

reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.¹⁷⁹

With respect to the implementation of amended Section 325, the SHVERA does not offer much flexibility with respect to minimizing its impact on small entities. In seeking analogous good faith obligations for MVPDs and broadcasters, Congress apparently sought to apply to MVPDs the existing regulatory framework concerning good faith retransmission consent negotiation obligations.¹⁸⁰ Accordingly, the SHVERA employs identical language to apply the existing good faith obligation to MVPDs.¹⁸¹ Therefore, the Commission does not have apparent discretion to impose differing good faith standards for small MVPDs than those for larger entities.

The statute's compliance requirements primarily impact MVPDs, such as cable and DBS providers. As discussed above, a large number of cable and other programming distributors, such as OVS, wireless cable systems and PCOs, are likely to be small businesses. As also discussed above, however, the SHVERA appears to give the Commission no discretion to craft alternate rules to minimize the impact of Section 325(b)(3)(C) on small entities. As previously noted, there are now only four DBS licensees, none of which are small entities. Small businesses do not generally have the financial ability to become DBS licensees because of the high implementation costs associated with satellite services.

In any event, we do not anticipate that the rules we adopt today will have a significant impact on small entities. In order to gain carriage on MVPDs, broadcasters must either elect must carry or retransmission consent. If must carry is elected, the good faith rules are inapplicable. If retransmission consent is elected, the parties must negotiate a carriage agreement. The proposed good faith rules merely require broadcasters and MVPDs to negotiate in accordance with the basic requirements of Section 76.65.¹⁸² If they do so, the failure to reach a carriage agreement is not a violation of our rules or the Communications Act. Broadcasters, large and small, have had to comply with the good faith obligation since 2000.

ACA requested that the Commission require that broadcasters give 30 days written notice to a small or medium sized cable operator of their intent to file a good faith complaint. In addition, ACA asked that the Commission provide an extra 10 day period in which to respond to good faith complaints filed against them.¹⁸³ The *Order* declined to establish special procedures for medium and small cable operators as requested by ACA. First, the Commission concluded that the requested 30 day pre-complaint notice would often not benefit these operators, particularly in instances where a retransmission consent agreement will imminently expire with the attendant loss of the broadcaster's signal. Because the Commission concluded in the *Good Faith Order* that MVPDs cannot continue to carry a broadcaster's signal after the existing consent expires even if a complaint is pending with the Commission,¹⁸⁴ it benefits both broadcasters and MVPDs alike that the Commission decline to institute a procedural delay that

¹⁷⁹ 5 U.S.C. § 603(c)(1)-(c)(4)

¹⁸⁰ See 17 U.S.C. § 119(a)(3); *House Commerce Committee Report* at 1 (Purpose of the SHVERA includes "increasing regulatory parity by extending to satellite carriers the same type of authority cable operators already have to carry 'significantly viewed' signals into a market"); see also, *supra*, Section III.A.3. of the *Notice*.

¹⁸¹ 17 U.S.C. § 119(a)(3).

¹⁸² See, e.g., *supra* ¶ 3 of the *Order* (negotiation standards).

¹⁸³ ACA Comments at 5. ACA argues that these procedural protections should apply not just to cable companies that serve 400,000 or fewer subscribers, but should also extend to "all medium-sized, non-vertically integrated cable companies." *Id.* n.7.

¹⁸⁴ *Implementation of the Satellite Home Viewer Improvement Act of 1999: Retransmission Consent Issues*, 15 FCC Rcd 5445, 5471-72 (2000) ("*Good Faith Order*"), *recon. granted in part*, 16 FCC Rcd 15599 (2001).